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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WORLDWIDE SUBSIDY GROUP, Plaintiff and Appellant, v. JEFFREY C. BOGERT, Defendant and Respondent.	B213979 (Los Angeles County Super. Ct. No. SC091734)

APPEAL from a judgment of the Superior Court of Los Angeles County. John H. Reid, Judge. Affirmed.

Pick & Boydston, Brian D. Boydston; Law Offices of David C. Hinshaw and David C. Hinshaw for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford & Stockalper, James J. Kjar and Albert E. Cressey III for Defendant and Respondent.

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Plaintiff and appellant Worldwide Subsidy Group appeals from a judgment entered following the trial court's grant of summary judgment in favor of defendant and respondent Jeffrey Bogert (Bogert). The trial court ruled that the undisputed evidence showed the action was barred by the one-year statute of limitations provided in Code of Civil Procedure section 340.6.[1] We affirm. The undisputed evidence showed that appellant knew of or had reason to suspect more than one year before filing suit that a settlement agreement negotiated and executed by Bogert had impaired and compromised its rights.

FACTUAL AND PROCEDURAL BACKGROUND

Facts Relating to Bogert's Representation.

In 1998, Raul Galaz (Raul) formed Worldwide Subsidy Group, LLC (WSG), a California limited liability company, and in 1999 formed Worldwide Subsidy Group, doing business as Independent Producers Group (IPG), a Texas limited liability company (sometimes collectively appellant). Both entities were in the business of collecting on behalf of clients certain royalties related to the cable or satellite retransmission of television programming. Raul held a 75 percent interest and Marion Oshita (Oshita) held a 25 percent interest in each company. Raul's wife Lisa Galaz (Galaz) served as a vice-president of IPG beginning in 2000. Raul and Galaz divorced in May 2002. In connection with that proceeding, the Texas family court approved an agreement whereby Raul transferred to Galaz a 37.5 percent interest and retained a 37.5 percent interest in appellant.

Also in May 2002, Raul sold his 37.5 percent interest in appellant to Oshita for $50,000. As a result of the sale, Oshita ostensibly held a 62.5 percent interest in each company and purported to control appellant. In 2002, prior to Raul's sale of his interest, appellant had retained Bogert to represent it in a dispute with a Dutch company involving

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[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

retransmission royalties. Galaz, who had been a paralegal since 1985, was unhappy with Bogert's representation in that matter.

Thereafter, in February 2003, Oshita hired Bogert to represent appellant in a dispute against the Motion Picture Association of America (MPAA) involving retransmission royalties for 1997 and certain decisions rendered by the Library of Congress and the Copyright Arbitration Royalty Panel (CARP) in 2001 (the CARP matter).[2] Another attorney had previously represented appellant in the CARP matter, but withdrew following a fee dispute. Both before and after she learned that Oshita had retained Bogert to represent appellant in the CARP matter, Galaz told Bogert, Oshita, Raul and her own attorney Brian Boydston (Boydston) that Bogert was not qualified to handle the matter; she directed Boydston to retain other competent counsel to represent appellant. Repeatedly, Galaz criticized Bogert's handling of the CARP matter; by May 2003 she requested that he cease doing further work on the matter. Separately, Galaz had retained Boydston in 2002 or 2003 to handle copyright matters on appellant's behalf.

In November 2003, Boydston's firm wrote to counsel for the MPAA stating that neither Oshita nor Bogert had authority to enter into a settlement on behalf of appellant. In or about March 2004, Bogert, purporting to act for IPG, entered into a settlement agreement in the CARP matter. Galaz and her counsel continued to exchange correspondence with Bogert and Oshita through mid-2004 which continued to question Bogert's authority to act on appellant's behalf.

Nonetheless, by December 2004, Boydston and Galaz knew that a settlement had been reached between the MPAA and appellant in the CARP matter; they knew of the terms of the settlement, which included a payment to appellant of $100,000. Boydston also served as Galaz's attorney in a separate action, *Galaz v. Oshita*, Superior Court of Los Angeles County case No. BC297015, which involved claims arising from Raul's purported sale to Oshita of his interest in appellant. Through discovery, Boydston

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[2] Also in February 2003, Raul began serving an 18-month sentence for a mail fraud conviction stemming from his misappropriation of retransmission royalties from a television show entitled Garfield and Friends.

received an unsigned copy of the settlement agreement in the CARP matter. In discussing Galaz's theory of the case in open court on December 6, 2004, Boydston stated: "The reason for [bifurcation] is the document upon which our damages claims will be largely based is a settlement agreement that was entered into between the companies, WSG, and the Motion Picture Association of America. . . . [The settlement agreement] was not actually provided to us until a week ago today. Once we had a chance to read it and digest it, we realized that this impacts our damages greatly, and it's going to require other documentation to substantiate those damages based upon this document, because this document memorializes a particular agreement, I won't go into the text now, that has ramifications on the amount of money the companies will be entitled to recover in the next several years. It's our contention that it greatly decreases the monies that the company will receive in the next several years. And, as a result of that, there's now been damages there." Boydston went on to state that learning the details of the settlement agreement one week earlier was significant because it showed how badly appellant's rights had been compromised.

In January 2005, a judgment was rendered in *Galaz v. Oshita*, which had the effect of rescinding Raul's sale of his 37.5 percent in WSG to Oshita and declaring that Galaz held a 75 percent ownership interest. Also in January 2005, immediately after she became appellant's majority owner, Galaz fired Bogert. She informed him via a letter from Boydston "that he was no longer to represent or hold himself out as attorney of record for either WSG or IPG."

In February 2005, Bogert turned over to Boydston his original files in the CARP matter. In April 2005, Galaz wrote to Oshita and Bogert, complaining that they continued to deny her access to certain books and records of appellant and asserting that "continuing violation of my entitlements are [*sic*] a basis for new claims, independent of any claims previously asserted." In June 2005, Galaz again wrote to Bogert, questioning his handling of client trust accounts and other accounting matters with detailed specificity. At that time, Bogert turned over his files related to his representation of

appellant and he considered his attorney-client relationship with appellant to be terminated.

Pleadings and Summary Judgment Motion.

On November 9, 2006, appellant and Galaz filed a complaint against Bogert alleging a single cause of action for professional negligence. The complaint alleged that Bogert acted below the applicable standard of care in several respects, including failing to turn over client documents in May 2005, improperly disbursing monies into his client trust account between April 2004 and January 2005, and negotiating a settlement agreement that resulted in WSG's "inability to collect *millions of dollars of royalty proceeds.*" Though the complaint did not allege the date of the settlement agreement, it alleged that the scope and nature of the settlement was not known to appellant and Galaz until February 2006.

In June 2008, Bogert moved for summary judgment on the ground the complaint was not timely filed within the limitations period provided by section 340.6. In support of his motion, he submitted declarations, deposition excerpts and numerous exhibits and transcripts from *Galaz v. Oshita.*

Appellant opposed the motion, asserting that triable issues of fact existed as to when it discovered the facts constituting Bogert's wrongful act or omission and as to when Bogert's representation concluded. In support of the opposition, appellant submitted the declarations of Raul, Boydston and its current counsel, as well as deposition excerpts and account statements. Bogert filed evidentiary objections to portions of the declarations and certain lodged exhibits, which the trial court sustained in part and overruled in part, resulting in the majority of the three declarations being excluded from evidence.

Following an October 1, 2008 hearing, the trial court granted Bogert's motion for summary judgment, ruling that he met his burden to establish that the applicable one-year statute of limitations applied to bar the action. The trial court determined that Bogert presented undisputed evidence to show that appellant had "sustained actual and appreciable harm no later than December 2004 or January 2005, and thus, that [appellant]

knew or should have known of Defendant's alleged negligence as of that date." More specifically, the trial court found that the evidence showed that in December 2004 Boydston and Galaz stated how the settlement agreement in the CARP matter had caused appellant's damage. The trial court rejected appellant's argument that knowledge of the settlement agreement did not make it aware of Bogert's wrongful acts, particularly given Boydston's comments in *Galaz v. Oshita*. It further determined that appellant failed to proffer any evidence demonstrating a triable issue of fact as to whether the limitations period was tolled because Bogert concealed his negligence or because he continued to represent appellant beyond January 2005.

Judgment was entered in January 2009 and this appeal followed.

DISCUSSION

Appellant contends the trial court erred in granting summary judgment, asserting that there were triable issues of fact as to whether it had adequate knowledge of Bogert's wrongdoing sufficient to trigger the limitations period. Alternatively, it contends there were triable issues of fact as to whether the limitations period was tolled by reason of either the absence of appellant sustaining actual injury, Bogert's continued representation of appellant or his willful concealment of his wrongdoing. Each contention lacks merit.

I. Standard of Review.

We review a grant of summary judgment de novo, considering "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) The general rule is that summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).) "In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the

pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) If there is no triable issue of material fact, "we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

Although our review of a grant of summary judgment is de novo, we review the trial court's evidentiary rulings for an abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) But in order to demonstrate an abuse of discretion, an appellant must affirmatively challenge the evidentiary rulings on appeal. That is, the asserted erroneous evidentiary rulings must be identified "as a distinct assignment of error" and be supported by analysis and citation to authority. (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.) Here, appellant has failed to make any challenge on appeal to the trial court's evidentiary rulings.[3] Where a plaintiff does not challenge the trial court's ruling sustaining a moving defendant's objections to evidence offered in opposition to a summary judgment motion, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been properly excluded. [Citation.]" (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014–1015.)

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[3] Without challenging the merits of any particular ruling, appellant summarily argues that the trial court's evidentiary rulings on the declarations cannot be construed to encompass the exhibits attached to those declarations. Appellant ignores that Bogert's evidentiary objections were expressly directed both to each declaration and to the lodged exhibits referenced in each declaration. Thus, we construe the trial court's evidentiary rulings to encompass any exhibit referenced in a declaration paragraph to which an objection was sustained.

II. The Undisputed Evidence Established that Appellant Discovered or Should Have Discovered the Facts Constituting Bogert's Wrongdoing More than One Year Before It Filed Its Complaint.

The statute of limitations applicable to actions for legal malpractice, section 340.6, subdivision (a), provides in pertinent part that "[a]n action against an attorney for a wrongful act or omission . . . arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, . . . whichever occurs first." The running of the statutory period is "tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury; [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation . . . ."

A defendant seeking to invoke the statute's one-year limitation "has the burden of proving, under the 'traditional allocation of the burden of proof' [citation], that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 8–9.) "[I]n legal malpractice actions statute of limitations issues, including injury, are at base factual inquiries." (*Adams v. Paul* (1995) 11 Cal.4th 583, 588.) However, "[w]hen the material facts are undisputed, the trial court can resolve the matter as a question of law in conformity with summary judgment principles." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 (*Jordache*).)

Bogert met his burden to show that appellant discovered or should have discovered the facts constituting his alleged negligence more than one year before it filed its November 2006 complaint. The undisputed evidence demonstrated that Boydston

received a copy of the settlement agreement in the CARP matter by December 2004.[4] At that point, Boydston stated that once he had an opportunity to "read and digest" the settlement agreement, he realized it had "ramifications on the amount of money the companies will be entitled to recover in the next several years. It's our contention that it greatly decreases the monies that the company will receive in the next several years."

Though appellant argues that this evidence was insufficient to establish it had knowledge of the specific actions that comprised Bogert's alleged malpractice by December 2004, "the one-year period is triggered by the client's discovery of 'the facts constituting the wrongful act or omission,' not by his discovery that such facts constitute professional negligence, i.e., by the discovery that a particular legal theory is applicable based on the known facts." (*Worton v. Worton* (1991) 234 Cal.App.3d 1638, 1650; accord, *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 42–43.) "It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action. Thus, if one has suffered appreciable harm and knows or suspects that professional blundering is its cause, the fact that an attorney has not yet advised him does not postpone commencement of the limitations period." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898.) "The test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation." (*McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 803.)

Here, the undisputed evidence showed not only that appellant had discovered the settlement agreement in the CARP matter negatively affected the amount of money it would receive over the next several years, but also that appellant knew or suspected that

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[4] Though appellant does not raise the issue that discovery of facts by Galaz and Boydston is not the same as discovery by appellant, we note that the undisputed evidence further established that Galaz assumed control of appellant in January 2005 after the jury verdict in *Galaz v. Oshita.* Moreover, an attorney's knowledge is imputed to the client. (*Bennett v. Shahhal* (1999) 75 Cal.App.4th 384, 391, fn. 3; *Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 828; *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1231.)

Bogert's representation was the cause of its damages. In connection with an earlier motion seeking a preliminary injunction in *Galaz v. Oshita*, Galaz declared: "An attorney, skilled in administrative hearings, and telecommunications and copyright law, is of critical importance in championing WSG-TX's [IPG's] methodology in the Copyright Appeal. [Citation.] If the Copyright Office rejects this methodology, adopts a slightly modified version of same, or fails to adequately defend its rejection of the competing methodology, enormous losses to the LLCs, the LLCs' clients, and Plaintiff will result." While general dissatisfaction with an attorney's performance is insufficient to trigger the limitations period (e.g., *McCann v. Welden* (1984) 153 Cal.App.3d 814, 822–823), the undisputed evidence here showed that Galaz never believed Bogert possessed the skill necessary to represent appellant in the CARP matter and, specifically, to advocate its royalty methodology in that action; in December 2004 Boydston received the settlement agreement which failed to adopt IPG's methodology; and also in December 2004 Boydston expressed his realization of the ramifications of that failure, stating that the settlement agreement would serve to decrease the amount of money to which appellant was entitled. The undisputed evidence established that the one-year limitations period commenced to run in December 2004.

We summarily dispose of appellant's tangential argument that its discovery of the settlement agreement was insufficient to trigger the limitations period for claims related to its belated discovery of Bogert's deposit and subsequent disbursement of checks owing to appellant. The complaint alleged that Bogert received such checks on or before September 14, 2005. Though appellant argues that it did not discover Bogert's alleged conversion of the checks until sometime in 2006, as confirmed by the absence of citations to the record in appellant's opening brief in support of this argument, it offered no admissible evidence to establish a triable issue supporting its belated discovery claim. A party opposing summary judgment must demonstrate the existence of a triable issue of fact through admissible evidence, and "[i]t hardly bears mentioning that argument of counsel is neither a declaration nor admissible as evidence in court." (*Saldana v. Globe–Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1518.) Allegations and argument related

to Bogert's improper receipt and disbursement of checks failed to create a triable issue of fact sufficient to defeat summary judgment.

III. The Undisputed Evidence Established that the Limitations Period Was Not Tolled.

Appellant alternatively contends that even if the limitations period was triggered in December 2004, it was tolled for three independent reasons.

First, appellant relies on section 340.6, subdivision (a)(1), which tolls the limitations period when "[t]he plaintiff has not sustained actual injury." It argues that because the settlement agreement impaired its right to collect future royalty distributions in an amount not yet ascertainable, it had not yet sustained "actual injury." In *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, the court explained why such an argument lacks merit. It reasoned that the Legislature's use of the term "actual" was designed to focus on the fact, rather than the extent, of damage sufficient to trigger the limitations period, and thus "actual injury need not be defined in terms of a monetary amount. [Citation.]" (*Id*. at p. 226.) "Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed." (*Id*. at p. 227.) The court summarized: "[W]hen malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred. [Citations.]" (*Ibid*.)

In *Jordache, supra*, 18 Cal.4th 739, our Supreme Court reiterated and applied these principles to hold that a client suffered "actual injury" when the law firm representing it failed to investigate its insurance coverage or to advise it to notify its insurer of an underlying action. It rejected the client's argument that actual injury did not occur until resolution of the coverage action, explaining that "the result of Jordache's coverage litigation could only confirm, but not create, Jordache's actual injuries from the late tender of the Marciano action's defense." (*Id.* at p. 753.) The court elaborated: "An

existing injury is not contingent or speculative simply because future events may affect its permanency or the amount of monetary damages eventually incurred. [Citations.]" (*Id*. at p. 754.) Thus, actual injury "does not depend on the plaintiff's ability to attribute a quantifiable sum of money to consequential damages" and is not "defined by a monetary amount." (*Id*. at p. 750.) Rather, "actual injury may consist of impairment or diminution, as well as the total loss or extinction, of a right or remedy." (*Ibid*.) Here, through Boydston appellant conceded that the settlement agreement had impaired and compromised its right to collect royalties over the next several years. Contrary to appellant's contention, quantification of those lost royalties would merely confirm, not create, the actual injury that appellant had suffered by reason of the settlement agreement. (See *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 977 [date client entered into adverse settlement agreement served as a "benchmark" from which the client could sue for legal malpractice].)

Second, appellant contends that it established a triable issue of material fact as to whether the limitations period should be tolled because Bogert continued to represent it. (§ 340.6, subd. (a)(2) [limitations period tolled during the period "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred"].) In support of the summary judgment motion, Bogert offered his January 2005 termination letter as well as his own declaration in which he averred that he turned over all files related to his engagement by June 2005 and considered the attorney-client relationship terminated at that point. In its effort to demonstrate the existence of a triable issue, appellant relies solely on evidence which the trial court held inadmissible, including evidence that Bogert's name remained on the proof of service for the CARP matter and Bogert remained as a signatory on a trust account within one year of appellant's filing suit.

Even if we were to consider Bogert's evidence, we would conclude that he failed to establish a triable issue of material fact as to whether he represented appellant beyond June 2005. Section 340.6, subdivision (a)(2) requires an objective determination of when the representation has ended. (*Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488,

1497.) Such determination must be based on evidence of an "ongoing *mutual* relationship and of activities in furtherance of the relationship." (*Id.* at p. 1498.) Remaining counsel of record, without more, is insufficient to establish the existence of an ongoing mutual attorney-client relationship. (*Baltins v. James* (1995) 36 Cal.App.4th 1193, 1198, fn. 5 ["simply remaining as a counsel of record does not constitute continued representation that tolls the limitations period of section 340.6"]; *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 848, 849 [failure to formally withdraw as counsel, "standing alone, does not satisfy the continued representation provision of section 340.6 for the purpose of tolling the running of the statute of limitations"].) Given evidence that appellant terminated its attorney-client relationship with Bogert more than one year before filing suit, coupled with the absence of evidence Bogert conducted any activities in furtherance of the relationship beyond his remaining as counsel of record, we agree with the trial court that appellant failed to show the statute of limitations should be tolled by reason of Bogert's asserted continued representation. (See *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1171 ["Once the client unequivocally decides that the relationship is over application of the tolling provision can no longer serve its purpose and it should be applied no further"].)

Finally, appellant contends that there were triable issues of material fact as to whether the limitations period should have been tolled because Bogert "willfully conceal[ed] the facts constituting the wrongful act or omission" when such facts were known to him. (§ 340.6, subd. (a)(3).)[5] But appellant points neither to evidence nor to authority that supports its contention. Appellant argues only that Bogert concealed his "actions" establishing his malpractice in connection with the settlement agreement, notwithstanding evidence that it received the settlement agreement and knew that its rights had been compromised through that agreement more than one year before filing this action. As explained in *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111,

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[5] Willful concealment tolls only the outside four-year limitations period, not the one-year period. (§ 340.6, subd. (a)(3).)

ignorance of Bogert's particular actions did not toll the statute: "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." Tellingly, the only case cited by appellant in support of its argument addresses tolling by reason of continuous representation—not willful concealment. (See *O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, 120–121 ["the client's awareness of the attorney's negligence does not interrupt the tolling of the limitations period so long as the client permits the attorney to continue representing the client regarding the specific subject matter in which the alleged negligence occurred"].) Accordingly, we find no basis to disturb the trial court's conclusion that appellant failed to show the statute of limitations should be tolled by reason of Bogert's willful concealment.

DISPOSITION

The judgment is affirmed. Respondent is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST